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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1968

No. 515

LOUIS KAYE,
Petitioner,

v.

CO-ORDINATING COMMITTEE ON DISCIPLINE OF THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, THE NEW YORK COUNTY LAWYERS' ASSOCIATION, AND BRONX COUNTY BAR ASSOCIATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York entered on June 14, 1968, affirming the order of the Appellate Division, First Department, of the Supreme Court of the State of New York, dated December 5, 1967, disbarring petitioner from practice as an attorney and counselor-at-law.

OPINIONS BELOW

The Court of Appeals wrote no opinion. The opinion of the Appellate Division is reported at 29 A.D. 2d 20, 284 N.Y.S. 2d 921.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3). The judgment of the Court of Appeals was entered on June 14, 1968.

QUESTIONS PRESENTED

1. Whether the Fifth Amendment requires the suppression in a disbarment proceeding of self-incriminating evidence obtained under the compulsion of a subpoena and the threat of disbarment for noncompliance with the subpoena.

2. Whether the Fifth Amendment permits a legal presumption of guilt to be drawn in a disbarment proceeding from the attorney's failure to testify.

3. Whether the Fourth Amendment prohibits the use in a disbarment proceeding of evidence contained in the attorney's testimony and private papers, or the fruits thereof, obtained from the attorney by an unconstitutional threat of disbarment if he refused to provide the testimony and furnish the private papers.

4. Whether the Fourth Amendment prohibits the use in a disbarment proceeding of evidence obtained by an investigating committee from an attorney's private papers which, after having been stolen, were submitted to the investigating committee.

5. Whether the cumulative effect in a disbarment proceeding of a complaint grounded in extortion, an investigation based upon stolen private papers, the use of self-incriminating evidence obtained under the compulsion of a subpoena and threat of disbarment, and the legal presumption of guilt because of the failure to testify represents such a departure from accepted standards of fairness as to constitute a deprivation of due process under the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, . . .

United States Constitution, Amendment V

> No person . . . shall be compelled in any criminal case to be a witness against himself . . .

United States Constitution, Amendment XIV

> Section 1 . . . nor shall any State deprive any person of life, liberty or property without due process of law; . . .

STATEMENT OF CASE

The Co-ordinating Committee on Discipline of the Association of the Bar of the City of New York, the New York County Lawyers' Association and the Bronx County Bar Association (hereinafter "the Co-ordinating Committee") was authorized on May 11, 1964, by the Appellate Division, First Department, to institute and prosecute a disbarment proceeding against petitioner. After receiving the Referee's report the Appellate Division, on January 13, 1966, ordered petitioner disbarred effective February 14, 1966. On February 13, 1967, this Court granted a petition for a writ of certiorari to review the Appellate Division's disbarment order, vacated the judgment of the Appellate Division, and remanded the case for reconsideration in the light of *Spevack v. Klein*, 385 U.S. 511. *Kaye v. Co-ordinating Committee*, 386 U.S. 17. On remand to the Appellate Division the Co-ordinating Committee moved for an order sustaining all but one of the charges of professional misconduct previously alleged. Petitioner cross-moved for an order of re-reference to hear the matter *de novo* and for other relief. By order dated December 5, 1967, the Appellate Division denied petitioner's motion for

a *de novo* hearing, sustained virtually all the charges, confirmed the Referee's report, and ordered petitioner disbarred effective January 5, 1968. On June 14, 1968, the Court of Appeals affirmed the Appellate Division's order of December 5, 1967.

A. *Proceedings Before Committee.* The complaint which precipitated the investigation by the Co-ordinating Committee was made by an attorney named Gelman who was formerly in petitioner's employ. Petitioner advised the Co-ordinating Committee that the complaint was made only after petitioner's refusal to submit to attempted extortion. Gelman had obtained some of petitioner's records and threatened to have him disbarred by their disclosure unless petitioner met his demand for the payment of money. These records were taken by Gelman from petitioner's private papers without his knowledge or permission. They were not presented at the time Gelman made his complaint or was first interviewed but were subsequently turned over upon the request of the Co-ordinating Committee and were used as the basis for obtaining testimony and evidence in the subsequent investigation.

In the course of this investigation, a subpoena was issued which directed petitioner to appear before the Co-ordinating Committee to testify and to produce certain books and records. Counsel to the Co-ordinating Committee informed petitioner that, in accordance with the practice upheld in *Cohen v. Hurley*, 366 U.S. 117, an additional charge independently sustaining disbarment would be filed if he failed to respond to the subpoena. Yielding to the compulsion of the subpoena and the threat of disbarment, petitioner produced the books and records demanded and testified in the secret investigation by the Co-ordinating Committee's recommendation and the Disbarment proceeding followed.

B. *Proceedings in the Appellate Division.* On July 7, 1964, the Appellate Division appointed a referee to take testimony and report with respect to the Co-ordinating

Committee's charges. Petitioner's answer denied the charges and asserted an unlawful search and seizure of his private papers and a violation of his privilege against self-incrimination under the Federal Constitution. Thereafter, claiming the protection of the Fourth, Fifth and Fourteenth Amendments, petitioner moved before the Appellate Division for an order suppressing the use before the Referee of the evidence obtained by the Co-ordinating Committee. This motion was denied on October 29, 1964.

(1) *Hearings Before Referee.* At the hearing before the Referee, testimony of petitioner in the Co-ordinating Committee's investigation was offered in evidence and received over petitioner's objection that its use in the disbarment proceeding would violate the self-incrimination prohibition of the Fifth Amendment as applied to state proceedings under the Fourteenth Amendment. Testimony before the Co-ordinating Committee offered by petitioner was excluded.

The Referee's report, dated July 23, 1965, stated that the investigation of petitioner was instituted as a result of a complaint which "evidently stemmed from the desire of Gelman to cause trouble to the respondent [petitioner] because of certain personal grievances" and that, in the course of the investigation, Gelman submitted to the Co-ordinating Committee a number of documents which he claimed had been discarded by petitioner. Petitioner claimed these were among the private papers which were stolen from his files. The Referee made no findings with respect to how these private papers were obtained and did not pass upon petitioner's constitutional objections stating that they had previously been rejected by the Appellate Division and this established the law of the case.

The report twice commented on the fact that petitioner "chose not to testify in this proceeding" and stated that his testimony before the Co-ordinating Committee "contains various admissions." This testimony, as well as petitioner's failure to volunteer explanations of certain testimony and

charges, was set forth in the Referee's report and relied upon to support his findings that eight charges had been proved.

(2) *Order of the Appellate Division of January 13, 1966.* After the Referee's report had been filed, petitioner filed a motion in the Appellate Division to remand the proceeding to the Referee for the purpose of receiving in evidence all petitioner's testimony before the Co-ordinating Committee and allowing the filing of a supplemental brief based upon this additional evidence or, alternatively, to incorporate such testimony in the record before the Appellate Division for consideration in its ruling with respect to the Referee's report and to permit supplemental briefs to be filed based upon such additional testimony. On January 13, 1966, the Appellate Division denied this motion, found petitioner had been guilty of professional misconduct and ordered that he be disbarred effective February 14, 1966.

The Appellate Division's opinion noted that petitioner did not testify at the hearings before the Referee, quoted from an earlier opinion that "disciplinary proceedings are not criminal proceedings," referred to the "legal presumption" of the truth of adverse testimony resulting from "the failure of an attorney to testify in a disciplinary proceeding," and commented on petitioner's "obligations to take the stand and be cross-examined as to any testimony he might give in attempted explanation of his conduct."

(3) *Order of the Appellate Division of December 5, 1967.* On the remand of the case after this Court vacated for reconsideration the order of January 13, 1966, the Co-ordinating Committee filed a motion in the Appellate Division for an order sustaining, with one minor exception, each of the charges previously sustained against petitioner. In a brief accompanying the motion, the Co-ordinating Committee asserted that it was not relying upon the Referee's report because that report was based upon petitioner's "own testimony to an extent which might be deemed inconsistent with the principles enunciated in *Spevack.*"

The brief recited that the Co-ordinating Committee's motion was "predicated solely upon the independent evidence in the record which may properly be considered by the Court." Petitioner filed a cross-motion praying, inter alia, for a new reference to obtain a rehearing of the matter *de novo*. By its order of December 5, 1967, the Appellate Division, "having reconsidered the matter in the light of *Spevack v. Klein;* and upon such reconsideration," ordered that the motion of the Co-ordinating Committee be granted to the extent of sustaining the charges, that the report of the Referee filed July 27, 1965, be confirmed with respect to the charges sustained, that petitioner's cross-motion be denied in all respects, and that petitioner be disbarred from practice as an attorney and counselor at law in the State of New York effective January 5, 1968.

In an opinion accompanying its order, the Appellate Division stated that the "motion and cross motion constitute a proper hearing on notice and on the filed papers." The only language in the opinion pertinent to reconsideration in the light of *Spevack v. Klein* is the following paragraph:

> Examination of the record reveals that there is sufficient without respondent's testimony to sustain charges 1,2,3 as modified by eliminating the Finegold specification, 4, 5,6,8, and 9. As to such charges the constitutional prohibitions or limitations have no controlling application.

The opinion does not disclose that the Court directed its attention to the problem of eliminating from its consideration documentary evidence which petitioner was required to produce, testimony or other evidence obtained from leads provided by the testimony and records coerced from petitioner, the Referee's findings based on inferences drawn from petitioner's failure to testify, the adverse legal presumption to which the Appellate Division referred in its earlier opinion because of petitioner's failure to testify, or the evidence obtained from or as a result of petitioner's

private papers which were stolen by a former associate and obtained on request by the Co-ordinating Committee.

On June 14, 1968, the Court of Appeals affirmed the decision of the Appellate Division. On July 2, 1968, the Court of Appeals granted petitioner's motion to amend the remittitur by adding thereto that upon appeal "there were presented and necessarily passed upon questions under the Constitution of the United States" in that petitioner contended that his disbarment resulted from a violation of "his constitutional right against unreasonable search and seizure and his right to privacy," "his constitutional privilege against self-incrimination," "his constitutional right to be confronted by the witnesses against him," and "his right to procedural due process of law." The amended remittitur recited that the Court of Appeals held there was no violation of any of petitioner's constitutional rights.

REASONS FOR GRANTING THE WRIT

The proceedings below (a) denied petitioner the protection of the privilege against self-incrimination guaranteed by the Fifth Amendment as applied to the states through the Fourteenth Amendment, (b) violated the unreasonable search and seizure prohibition of the Fourth Amendment as applied to the states through the Fourteenth Amendment, and (c) departed from fundamental concepts of fairness to such a degree as to constitute a deprivation of due process under the Fourteenth Amendment. These are the same grounds urged in the petition for a writ of certiorari to review the disbarment order of January 13, 1966, which was vacated by this Court on February 13, 1967. *Kaye v. Co-ordinating Committee,* 386 U.S. 17. The perfunctory "reconsideration" by the Appellate Division of its prior order in connection with the claimed violation of the self-incrimination privilege renders the new order, based on the same investigation, hearings, Referee's report, and Appellate Division review, subject to the same constitutional infirmities on this ground presented in the prior petition. The

unreasonable search and fundamental fairness grounds for certiorari have not been passed upon.

1. *Privilege Against Self-Incrimination.* The claim of a denial of the privilege against self-incrimination has two facets: (1) the compulsory production and evidentiary use of self-incriminating evidence and (2) the penalty imposed upon petitioner because of his failure of offer himself as a witness in the hearings before the Referee. The claimed violation of the privilege with respect to the compulsory production and evidentiary use of self-incriminating evidence rests on the contention that the disbarment of an attorney from the practice of law is the equivalent of a criminal penalty and, therefore, within the protection of the privilege. Accordingly, the use in the disciplinary proceeding of incriminating evidence compelled by threat of disbarment constituted an invasion of the privilege.

Although the Appellate Division purported to find the charges against petitioner sustained without reliance upon petitioner's testimony, this bare statement is hardly sufficient to remove the taint of the coerced evidence which permeated both the Referee's and the Appellate Division's consideration of the entire proceeding. In stating "that there is sufficient without respondent's [petitioner's] testimony to sustain" the charges, the Court did not even advert to the records which petitioner was compelled to produce or the evidence which was obtained as a result of that coerced from petitioner. Neither did it deal with the adverse inferences previously drawn by the Referee and the Appellate Division by virtue of petitioner's silence before the Referee. The investigation of the Co-ordinating Committee proceeded from petitioner's compelled evidence. This evidence was introduced in the hearings before the Referee, and, as acknowledged by the Co-ordinating Committee, was relied on in the Referee's report which the Appellate Division in its current order confirmed notwithstanding this admitted reliance. The Appellate Division's denial of a new hearing to petitioner made it impossible to

purge from the proceedings below the taint of the compelled testimony and adverse inferences. Mere exclusion from consideration, even if this were possible, of petitioner's own testimony is only the beginning of the process. For this reason the "reconsideration" by the Appellate Division does not eliminate from the case petitioner's claimed violation of his privilege against self-incrimination.

If disbarment is a criminal penalty, the Fifth Amendment precludes the use of coerced testimony in the disciplinary proceeding. The compulsion of incriminating testimony generates an immunity from sanctions which are "criminal in nature" (*Ullmann v. United States*, 350 U.S. 422, 431) whether or not the immunity is contemplated when the testimony is compelled. *Garrity v. New Jersey*, 385 U.S. 493. Consequently, after petitioner invoked his privilege against self-incrimination, compelling him to testify under threat of disbarment barred the use of this testimony in any proceeding which might result in the imposition of a penalty of a criminal nature. In *Ullmann v. United States, supra*, where the constitutionality of an immunity statute was assailed on the ground that the testimony compelled might result in disqualification from federal employment and other disabilities, the Court stated that a witness who is compelled to answer under the protection of immunity "has, of course, when a particular sanction is so sought to be imposed against him, the right to claim that it is criminal in nature." 350 U.S. at 431. The use of compelled testimony in the present case, therefore, squarely poses the question whether a disciplinary proceeding is a "criminal case" within the meaning of the Fifth Amendment's prohibition against compelled, self-incriminating testimony.

There is formidable authority in the decisions of this Court for the view that, for self-incrimination purposes, a disciplinary proceeding is criminal in nature. *Boyd v. United States*, 116 U.S. 616; *Lees v. United States*, 150 U.S. 476; cf. *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701. Certainly, the loss of one's right to practice his

profession is no less a criminal penalty than the forfeiture of property involved in the *Boyd* case. The continued vitality of the *Boyd* case was underscored by the reaffirmation in *Spevack v. Klein* "of the broad protection given the privilege" in *Boyd v. United States, supra.* In *Boyd* "compulsory production of books and papers of the owner of goods sought to be forfeited was held to be compelling him to be a witness against himself" (385 U.S. at 515). The *Lees* and *Plymouth Sedan* cases also involved property forfeitures. The dissenting opinions in *Cohen v. Hurley,* 366 U.S. 117, overruled in *Spevack v. Klein,* 385 U.S. 511, expounded the views that the effects of disbarment were so severe as to entitle a lawyer to "the full benefit of the 'law of the land'" (366 U.S. at 147) and that "taking away a man's right to practice law is imposing a penalty as severe as a criminal sanction" (366 U.S. at 153-154).

Denial of the right to engage in the practice of law or in other occupations has been held similar to a criminal penalty for the purpose of other constitutional provisions. An attorney has been held "entitled to procedural due process, which includes fair notice of the charge" in disciplinary proceedings because they "are proceedings of a quasi-criminal nature" and disqualification from practice "is a punishment or penalty imposed on the lawyer." *In Re Ruffalo,* 390 U.S. 544. Disqualification from the practice of law, as well as the pursuit of other vocations, has been regarded as punishment for purposes of the Constitution's bill of attainder and ex post facto prohibitions. *Ex parte Garland,* 4 Wall. 333, 377 (legislative denial of an attorney's right to practice "for past conduct can be regarded in no other light than as punishment for such conduct"); *Cummings v. Missouri,* 4 Wall. 277, 327 ("This deprivation [of right to pursue regular avocations] is punishment"); *United States v. Brown,* 381 U.S. 437 (disqualification from holding union office held punishment). No reason is readily apparent why disqualification from practicing law, which has been regarded as a criminal penalty for the purpose of other constitutional safeguards, should not simi-

larly be regarded as criminal punishment for purposes of the privilege against self-incrimination. The question whether disciplinary action against attorneys is within the protection of the privilege, therefore, warrants review by this Court.

The importance of determining whether a disciplinary proceeding is a criminal case for purposes of the privilege is accentuated by the interpretation of the Court's recent decisions in *Uniformed Sanitation Men v. Commissioner of Sanitation*, 392 U.S. 280 and *Gardner v. Broderick*, 392 U.S. 273, as indicating that attorneys may be compelled, absent the possibility of criminal prosecution, to provide information that may lead to their disqualification from practice. The opinion of the Court by Mr. Justice Fortas in the *Gardner* case acknowledged (p. 278) that if "a policeman had refused to answer questions specifically, directly, and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself, *Garrity v. New Jersey, supra*, the privilege against self-incrimination would not have been a bar to his dismissal." Mr. Justice Harlan, however, apparently derives from this the conclusion that an attorney similarly may be disbarred, notwithstanding the decision in *Spevack v. Klein, supra*, for refusing to answer questions concerning the practice of his profession. In a concurring opinion, joined by Mr. Justice Stewart, he finds in the *Gardner and Uniformed Sanitation cases* "a procedural formula whereby" lawyers may be "disciplined for refusing to divulge to appropriate authority information pertinent to the faithful performance of their offices" (392 U.S. at 285). Obviously, if lawyers may be punished for refusing to disclose information that may lead to disciplinary action, such punishment is not within the protection of the privilege. Mr. Justice Fortas, however, expressly differentiated the situation of a public official from that of a lawyer, thereby suggesting that, even absent the possibility of criminal prosecution, the lawyer may not be disciplined for re-

fusing to provide information concerning his law practice presumably because disciplinary proceedings are within the scope of the privilege. The desirability of a dispositive decision of this Court to resolve any doubt on the important constitutional question whether the privilege applies to the penalty of disqualification from the practice of law seems apparent.

Whether or not disbarment is within the scope of the privilege, the adverse presumption drawn by the Appellate Division in its original decision from petitioner's failure to testify before the Referee imposed an impermissible penalty on the exercise of the privilege and, standing alone, also constituted an unconstitutional denial of its protection. The Appellate Division did not address itself to this matter on "reconsideration" and there is no basis for assuming that its effect has been dissipated. In *Malloy v. Hogan*, 378 U.S. at 8, the Court made clear that application of the Fifth Amendment standards to the Fourteenth Amendment precluded the States from penalizing the exercise of "the right of a person to remain silent." Thus, the Court held in *Griffin v. California*, 380 U.S. 609, 614, that adverse comment by a court or prosecutor upon the refusal to testify is repugnant to the Fifth Amendment, since "[i]t is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly." Drawing an adverse conclusion from petitioner's failure to testify is patently a greater penalty than the adverse comments to the jury condemned in *Griffin v. California*. Although the Appellate Division's current opinion recites that it disregarded all petitioner's testimony, nothing in the opinion even suggests that it abandoned the unfavorable inference previously drawn from petitioner's failure to testify.

(2) *Unreasonable Search and Seizure.* The compulsory production of petitioner's testimony and private papers under an unconstitutional threat of disbarment and the Coordinating Committee's request for petitioner's stolen pri-

vate papers constituted unreasonable searches under the Fourth Amendment.

A. *Spevack v. Klein, supra,* decided that a lawyer cannot be disbarred because of his refusal to testify at a disciplinary investigation in reliance on the privilege against self-incrimination. Petitioner, however, under threat of disbarment in violation of his constitutional rights, was compelled to forego the privilege and supply inculpatory records and information. The fruits of this unconstitutional compulsion were introduced as evidence in the disciplinary proceeding. *Boyd v. United States, supra,* held that "a compulsory production of a man's private papers to establish a criminal charge against him or to forfeit his property is within the scope of the Fourth Amendment" (115 U.S. at 622). Coerced production for disciplinary purposes would appear similarly to be within its scope.

B. In view of *Mapp v. Ohio,* the decision in *Elkins v. United States,* 364 U.S. 206, suggests that the guarantees of the Fourth Amendment were disregarded also in the evidentiary use against petitioner of his private papers stolen by Gelman which were produced at the request of the Co-ordinating Committee. *Elkins v. United States* discarded the so-called "silver platter" doctrine pursuant to which records illegally obtained by state officials could be turned over to federal officials and used as evidence in a federal prosecution. The Court held that evidence obtained by state officers during a search that would have been illegal under the Fourth Amendment if conducted by federal officials was inadmissible in federal proceedings. The controlling factor was the illegal method by which the evidence was obtained rather than the status of the official who illegally obtained it.

The *Elkins* holding that the illegal state action contaminated the evidence even for federal proceedings is not, of course, a holding that all illegally obtained private papers are barred by the Fourth Amendment from incriminating use against their rightful owner. It appears, however, to be

a large step in the direction of the dissent by Mr. Justice Brandeis, concurred in by Mr. Justice Holmes, in *Burdeau v. McDowell*, 256 U.S. 465, 476-477, which condemned the evidentiary use of papers stolen by a private individual and turned over to federal officials, stating "Respect for law will not be advanced by resort, in its enforcement, to means which shock the common man's sense of decency and fair play." See also dissenting opinions of Mr. Justice Holmes and Mr. Justice Brandeis in *Olmstead v. United States*, 277 U.S. 438 (1928).

Arguably, the use as evidence by state officers of stolen papers constitutes state collaboration in illegal conduct and, therefore, unconstitutonal state action. Cf. *Bram v. United States*, 168 U.S. 532. In the present case, however, the State's involvement is much clearer since the stolen papers were not voluntarily submitted but were requested by the Co-ordinating Committee when advised of their existence. The Co-ordinating Committee thus participated in obtaining the papers for use in connection with its own investigation and the subsequent proceedings. The use in the proceedings of these stolen papers or the fruits of their disclosures cannot be upheld "without making the courts themselves accomplices in willful disobedience of law." *McNabb v. United States*, 318 U.S. 332, 345.

This view has recently been adopted by the Court of Appeals for the Seventh Circuit in a case involving the evidentiary use of stolen documents. The court held the Federal Trade Commission's knowing acceptance and use in a price discrimination proceeding of private papers stolen by an employee for the purpose of aiding the Commission's counsel to be equivalent to an unreasonable search and seizure violative of the Fourth Amendment. *Knoll Associates, Inc. v. Federal Trade Commission*, 396 F.2d ___ (1968 Trade Cases 72,494, C.A. 7, decided June 18, 1968).

C. The exclusionary rule with respect to evidence obtained by an unreasonable search was held applicable to state proceedings in *Mapp v. Ohio*, 367 U.S. 643. The Fourth

Amendment has been held applicable to administrative investigations (see, e.g. *See v. City of Seattle*, 387 U.S. 541) and the policy of the exclusionary rule to discourage violation of the constitutional protection would seem to preclude the State's use of evidence obtained in violation of the Fourth Amendment in a civil or quasi-criminal, as well as a criminal, proceeding. See *Mapp v. Ohio, supra; Elkins v. United States, supra.* Evidence tainted by an unreasonable search has been held by a Court of Appeals inadmissible in an administrative proceeding which resulted in a cease and desist order. *Knoll Associates, Inc. v. Federal Trade Commission*, 396 F.2d___(1968 Trade Cases 72,494, C.A. 7, decided June 18, 1968). The same policy should preclude use in disciplinary proceedings of the product of the constitutional invasion to the detriment of the person whose constitutional privilege was violated. The present case thus presents questions of important constitutional dimensions under the Fourth, as well as the Fifth Amendment.

3. *Deprivation of Due Process.* Whether or not the self-incrimination and unlawful search and seizure prohibitions of the Fourth and Fifth Amendments have been violated, the proceedings which culminated in the disbarment order departed so radically from concepts of fundamental fairness as to constitute a violation of the more generalized due process clause of the Fourteenth Amendment.

The factors which infect the disbarment proceedings are their malicious inception in the refusal of petitioner to yield to attempted extortion, the Co-ordinating Committee's solicitation from Gelman of the production of petitioner's stolen private papers, the secret investigation predicated upon Gelman's malevolent complaint and the stolen papers, the service of a subpoena upon petitioner directing him to produce incriminating evidence for his own disbarment under threat of disbarment for failure to comply, the filing of charges on the basis of an investigation so commenced and evidence so obtained, the use of the prejudicial evidence so obtained from petitioner in the hearings on

the charges, the adverse conclusions drawn by the Referee and by the Appellate Division from petitioner's failure to testify in the hearings before the Referee, and the perfunctory reconsideration by the Appellate Division on remand without a hearing which would permit complete eradication of the contamination of the prior proceedings.

This extraordinary combination of circumstances constituted a denial of due process. Although all-encompassing standards of due process under the Fourteenth Amendment have not been precisely defined, conduct which is unduly offensive to the sense of fairness inherent in our traditional concepts of liberty and respect for individual rights or which shocks the common understanding of decency and fair play does not satisfy its requirements. The standards of procedural due process in a disbarment proceeding approach those applied in cases of a criminal nature. *In re Ruffalo, supra.* From its sordid inception in frustrated extortion to its culmination in penalizing petitioner both from words out of his own mouth and for his not having spoken, the disbarment proceeding violated the fundamental fairness standard of the due process clause of the Fourteenth Amendment. Cf. *Rochin v. California,* 312 U.S. 165; *Rogers v. Richmond,* 365 U.S. 534; *Raley v. Ohio,* 360 U.S. 423.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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